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No. 65, Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

STATE OF TEXAS,

Plaintiff,

vs.

STATE OF NEW MEXICO,

Defendant.

Texas' Response Opposing New Mexico's Motion to Stay

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Texas opposes New Mexico's Motion to Stay Adoption of Pecos River Master's Final Report and urges that it be overruled on the following grounds:

Background and New Mexico's Request

Consistent with his obligations in the phase of this case requiring continuing administration of the Court's Amended Decree of March 28, 1988 ("Decree Administration Phase"), the River Master issued his first Final Report on June 23, 1988. In it, he determined that New Mexico delivered 15,400 acre-feet of water more than its obligation under Article III(a) of the Pecos River Compact for water year 1987.

For that water year, the Manual governing the River Master directs that flood inflows be calculated by averaging the annual flood inflows for 1985, 1986, and 1987. *See* Manual, Item A.1, second and third sentences. One element in determining annual flood inflows is the base inflow for the Acme-to-Artesia reach of

the river. Item B.3.g of the Manual directs that this base inflow number be the one "furnished" by the United States Geological Survey.

New Mexico seeks to stay adoption of the Final Report until after the Court acts on the Special Master's report following the evidentiary hearing in the other phase of this case, which concerns the remedy for New Mexico's Compact violations during the 1950-1986 period ("Remedies Phase").* New Mexico's premise is that the River Master must calculate the flood inflows for 1985 and 1986 using the Acme-to-Artesia base inflow method and data that this Court ultimately approves for those two years in the Remedies Phase, notwithstanding Item B.3.g of the Manual. The premise is substantively faulty, and the motion seeks a remedy that is unavailable when, as here, it is unaccompanied by a timely motion seeking review of the River Master's action.

Argument: Substantive Invalidity

The Decree Administration Phase and the Remedies Phase of this case now are entirely separate from one another. The parties agreed upon this approach in a hearing before the Special Master. Tr. 18-25, 35-36 (10/15/87). Contrary to the assumption implicit in the stay motion, the two phases do not overlap even for the limited purpose of determining flood inflows for 1985 and 1986.

The remote possibility that in the future the Court might adopt a different method for determining 1985 and 1986 flood inflows in the ongoing Remedies Phase than already has been adopted for those years when they are averaged with flood inflows for 1987 in the Decree Administration Phase is legally irrelevant. The River Master's duty is to follow directives the Court already has given him, not those it might in the future give someone, such as a Special Master, acting in a different capacity.

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* The unfortunate death of the Special Master, Mr. Charles J. Meyers, likely will result in an indefinite postponement of the evidentiary hearing in the Remedies Phase.

In the last report forwarding his recommendations to the Court, the Special Master noted that the issue of the shortfalls, if any, for the period 1984 through 1986 was to be tried in the Remedies Phase of the case. 1987 Report, at 1. He emphasized that the objective of the proposed amended decree was "so that a *complete charter* for the enforcement of the Court's judgment is available in one place for the River Master." *Id.*, at 2 (emphasis added). The Court completed the case's bifurcation by approving the 1987 Report and adopting its proposed amended decree. *Texas v. New Mexico*, 108 S.Ct. 1201 (1988). The only connections remaining between the two phases are those of history and legal preclusion.

Article III.B.1.b of the "complete charter" embodied in the Amended Decree provides an explicit directive to the River Master for water year 1987: calculate any overage "pursuant to the methodology set forth in the Manual." It does not qualify this directive by suggesting that the River Master delay final action past designated deadlines while awaiting further directives from the Special Master and the Court on whether and how the Manual's methodology should be changed.

As New Mexico acknowledges in paragraph 6 of its motion with regard to the computation in question, the River Master precisely implemented the Court's explicit directive. New Mexico's admission that the River Master followed the Amended Decree, especially when coupled with the explicitness of the decree, suffices at the threshold to defeat its stay request. *Cf. Lucas v. Townsend*, 108 S.Ct. 1763, 1764 (Kennedy, Circuit Justice 1988) (stay inappropriate when there is not a "fair prospect" that five Justices will conclude that the case was erroneously decided below).

Argument: Procedural Futility

Aside from its substantive invalidity, New Mexico's stay request must fail because it is unaccompanied by a timely motion seeking review of the River Master's Final Report. Article III.D of the Amended Decree requires that a motion for review of the River Master's Final Report be filed within thirty days of its adoption. The Final Report was adopted on June 23, 1988, and New Mexico did not file a motion for review by July 23rd, thirty days from its adoption. Therefore, the deadline has passed for New Mexico to obtain review of the River Master's Final Report. Because New Mexico seeks to stay the effectiveness of a River Master Final Determination that is no longer reviewable, its stay request is futile and should be rejected.

Conclusion

The relief sought by New Mexico would reestablish the connection between the Remedies Phase and the Decree Administration Phase of this case that the Court explicitly severed when it approved the Special Master's 1987 Report and adopted the Amended Decree. New Mexico's motion to stay should be overruled, thereby maintaining the integrity of the Amended Decree as a complete charter for the River Master.

Respectfully submitted,

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